ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	GC Docket No. 96-55
Notice of Proposed Rulemaking on The Treatment of Confidential Information Submitted to the Commission	)	

REPLY COMMENTS

MCI Telecommunications Corporation (MCI) hereby replies to comments filed in response to the Commission's Notice of Proposed Rulemaking, FCC 96-109, GC Docket No. 96-55, released March 25, 1996 (NPRM). Therein, comments were sought on a proposed policy that would guide the Commission in evaluating requests for confidential treatment of information under the Freedom of Information Act (FOIA).[1] Comments also were sought on conditions under which various kinds of information should be routinely made available for public review.

In its initial comments, MCI recommended that the Commission adopt the following general uniform approach for handling requests for the confidential treatment of information, as follows:

- Parties seeking confidential treatment for submitted information must bear the burden of proof of demonstrating such confidentiality;

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[1] 5 U.S.C. Sec. 552.

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- Commission decisions in proceedings before it cannot be based on information not available to all parties;

- In conducting the legal balancing test under the FOIA to determine whether discretionary public disclosure of confidential material is appropriate, the public interest in disclosure will vary, depending upon the type of proceeding, the relevance and materiality of the information to issues in the proceeding, and the nature of the material; and

- Requests for confidential treatment should not be entertained when a statute or rule requires disclosure, such as in the case of Local Exchange Carrier (LEC) tariff cost support, because a balancing (as between disclosure and non-disclosure) was performed when the statute or rule was enacted.

These reply comments will address positions that are inconsistent with those of MCI.

I. THOSE CLAIMING INFORMATION TO BE "CONFIDENTIAL" BEAR THE BURDEN OF PROOF OF SO DEMONSTRATING

Currently, the Commission imposes the burden of proof on the party requesting confidential treatment rather than on the party contesting the request. This principle is reflected in Commission Rules[2] and in established precedent,[3] and should not

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[2] Section 0.459(d) states that the Commission will treat information submitted to it as confidential only when a requester "presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act." Section 0.459(b) of the Rules even imposes the requirement that requests for confidential treatment of submitted information "contain a statement of the reasons for withholding the materials from [public] inspection," and Section 0.459(c) provides that "casual requests" for confidential treatment of material will not be considered.

[3] Order Initiating Investigation, Southwestern Bell Telephone Company Transmittal Nos. 2470, 2489, CC Docket No. 95-158, rel. October 13, 1995; see also Letter from Regina M. Keeney, Chief, Common Carrier Bureau to Thomas A. Padja, Esquire, Southwestern Bell Telephone Company, dated November 28, 1995 (RE: Southwestern Bell Transmittal Nos. 2498 and 2501) (DA 95-2395).

be modified.

In contrast, several Regional Bell Operating Companies (RBOCs) suggest that parties seeking access to allegedly confidential information should have the burden -- a negative one -- of proving that the information does not deserve confidential treatment.[4] This position is completely at odds with current Commission policy regarding public disclosure of information submitted on the record in agency proceedings. As Cincinnati Bell Telephone (CBT) correctly notes, the current requirement for parties to substantiate their requests for confidential treatment is important because it tends to avoid frivolous requests for confidential treatment.[5]

The law firm of Alan M. Lurya believes that the current standard should be changed by placing the burden on Commission staff to demonstrate why submitted information should not be given confidential treatment.[6] Again, it is being requested that a party prove a negative, this time Commission staff, which has neither the resources, presumably, nor the desire to interject itself into these controversies.

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[4] Joint comments of Ameritech, The Bell Atlantic Telephone Companies, Bell Communications Research, Inc., BellSouth Corporation, NYNEX, Pacific and Nevada Bell, and US West, Inc. (Comments of RBOCs) at 5-6.

[5] Comments of CBT at 4-5.

[6] Comments at 1.

II. DOMINANT CARRIERS MUST NOT BE PERMITTED TO ACHIEVE DEREGULATION BY RELYING ON FALSE CLAIMS OF COMPETITION

As noted in MCI's initial comments, a number of dominant carriers have been using claims of confidentiality to deregulate themselves, and the Common Carrier Bureau has unwittingly encouraged them on occasion by granting waivers of Commission requirements, whether such waivers were requested or not.[7] SBC Communications, Inc. (SBC) makes explicit the objective of achieving its tariff deregulation by arguing that dominant carriers should no longer be required to support tariff filings with cost data.[8]

This proceeding is not the proper forum in which to entertain challenges to Commission rules designed to assure reasonable rates and, even if it were, SBC's approach is plainly wrong. Its position that aggrieved parties can protect

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[7] See Application for Review by MCI, Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 863, filed July 10, 1995, pending; Application for Review by MCI, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2480, filed November 17, 1995, pending; Application for Review by MCI, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2525, 2528, 2529, 2531, filed March 25, 1996, pending; Application for Review by MCI, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2508, 2536, filed April 8, 1996, pending; Application for Review by MCI, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2533, filed April 19, 1996, pending; Application for Review by MCI, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 2524, filed May 6, 1996, pending; Application for Review by MCI, Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 949, filed June 21, 1996, pending.

[8] Comments of SBC at 6. ("ILECs [incumbent local exchange carriers] should no longer be required to support tariff filings with cost data.")

themselves via the Commission's Section 208 complaint process,[9] in which, under SBC's approach, no discovery would be allowed[10] is completely without merit. In essence, SBC is suggesting that cost support be eliminated from the tariff process and be immunized from discovery in the complaint process. The combined effect would be that interested parties could never obtain access to information needed to challenge a LEC tariff or sustain a complaint and that, accordingly, no case could be made in any forum against local exchange carrier (LEC) rates.

III. THE PUBLIC NATURE OF TARIFF COST SUPPORT MUST BE PRESERVED

MCI strongly opposes the RBOCs' recommendation that Section 0.455(b)(11) of the Commission's Rules be amended to show that the requirement for filing tariff cost support is merely an "administrative rule dealing with what information will be placed at the FCC," rather than a "substantive rule requiring public disclosure of ... material."[11] This position is clearly inconsistent with the public interest. As MCI demonstrated in its initial comments, dominant carrier rates must be cost-supported and that support must be as available to the public as the tariff itself.[12]

Contrary to the position of the RBOCs that the ability to

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[9] Id. at 6-7.

[10] Id. at 14.

[11] Comments of RBOCs at 24-25.

[12] MCI Comments at 15-17.

obtain and use cost support information confers an unearned advantage on those reliant on them for access services,[13] just the opposite is true. Rather than conferring an unearned advantage, it offers the only realistic way that captive ratepayers can uncover whether they are paying reasonable rates for essential services. The RBOCs present no credible evidence to support their position that MCI and others, by having access to tariff cost support, can know precisely what their "margins" are and, therefore, make themselves more effective potential competitors.[14] Thus, the RBOCs presume a state of competition in the access market that simply does not exist.[15] Given this lack of competition, CBT's contention that there should be a "fundamental change in the nature of tariff proceedings" is extremely misguided.[16] The Commission should not let baseless assertions of potential competition alter the current tariff cost support requirement.

CBT suggests that a request for confidentiality should be supported by an affidavit which states that submitted information involves a service that is expected to be subject to

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[13] Id. at 7.

[14] Id. at 9.

[15] The Common Carrier Bureau concluded that in comparison to the established local exchange carrier industry, alternative local service providers are "tiny," constituting less than 0.05 % of the interstate access market. Common Carrier Competition, Spring 1995 at 6.

[16] CBT at 2-3.

competition.[17] Such a claim, however, doubtless would be made in connection with all tariff submissions made for all tariffed services, thus rendering this affidavit approach meaningless. Interexchange carriers have the need and right to review LEC tariff support materials to determine the reasonableness of the prices they pay. Hence, the Commission should not prohibit, as CBT urges, challenges to confidential treatment of tariff cost support to allow review of proposed tariff rates.[18]

IV. ALL CONFIDENTIALITY ISSUES MUST BE RESOLVED BEFORE TARIFFS ARE ALLOWED TO BECOME EFFECTIVE

The Commission should not, as CBT suggests, adopt rules that allow tariff proceedings to move forward on the timetable provided in the Telecommunications Act of 1996 without any regard being given to resolution of challenges made to confidentiality requests.[19] MCI agrees with Sprint Corporation that streamlined processing of a LEC tariff filing under Section 402(b) of the Act should not apply whenever the LEC has requested confidential treatment for material supporting its filing.[20] Given the short time-frame involved with streamlined processing, the Commission will need additional time to determine if any request for confidential treatment should be granted.

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[17] Id. at 6-7.

[18] Id. at 8.

[19] Id. at 7.

[20] Comments at 5. Indeed, pursuant Section 402(b)(3) of the Act, the Commission can decide not to apply streamlined processing.

V. TARIFF COST SUPPORT INFORMATION REVEALED UNDER PROTECTIVE ORDERS FAILS TO SATISFY THE REQUIREMENT THAT THE INFORMATION BE PUBLICLY AVAILABLE

The Commission must not be persuaded by any proposal allowing LECs to avoid public disclosure of tariff cost support if they are willing to make the information available pursuant to a protective agreement.[21] Simply put, tariff cost support submitted pursuant to a protective agreement is no substitute for public disclosure, either in theory or in practice. Because information supporting LEC tariff filings must be publicly available, only prompt and unrestricted access to materials submitted can satisfy legal requirements and the public interest.

The Commission also should not be deceived into believing that protective agreements are satisfactory alternatives. In MCI's experience, parties holding claimed confidential information, if left to their own devices, likely will seek to impose protective agreements that contain overly restrictive and onerous provisions. Such one-sided protective agreements force parties seeking access to the information, usually under extreme time pressures, to "take it or leave it" -- requiring them to either receive the information subject to overly restrictive and onerous provisions or forego receiving it altogether.

As even the RBOCs themselves note, protective agreements are not a "cure-all."[22] First and foremost, they affect directly and

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[21] Comments of RBOCs at 13.

[22] Id. at 9.

substantially the ability of those who enter them to perform their jobs after "exposure" to the information. Moreover, the use of such agreements imposes sizeable costs and burdens on regulators and the parties subject to them in connection with the use of the information in proceedings.[23] Thus, tariff cost support revealed under protective orders is not a substitute for cost support made on the public record.

With regard to the proposed protective order, the document should not be modified, as CBT suggests, to require disclosure of the names and curriculum vitae of representatives who are to review the confidential information.[24] Apparently, CBT wants to allow the party who has submitted the alleged confidential information to be able to challenge the qualifications of those representatives.[25] This proposal is unreasonable, since the sole assessor of qualifications of such representatives should be their own principals.[26]

VI. COMMISSION DECISIONS AND INFORMATION UPON WHICH THEY RELY MUST BE MADE PUBLICLY AVAILABLE

Finally, the NPRM suggests that it may sometimes be necessary to issue parts of adjudicatory decisions under seal in

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[23] Comments of Time Warner Communications Holdings, Inc. at 9.

[24] Comments of CBT at 4.

[25] Id.

[26] Perhaps CBT would like Craig Livingstone to review the files of people seeking access to allegedly confidential information?

order to adequately explain the decision for purposes of judicial review.[27] The RBOCs' view that such actions would not unduly hinder the administration of complaint proceedings, nor unduly limit the precedential value of Commission adjudications,[28] is naive at best. Operating under the constraints of protective orders clearly will render proceedings cumbersome and will impact the precedential value of actions because there will be no precedent for the public to look to and be guided by. Commission decisions and the information upon which they rely, therefore, must be made public.

CONCLUSION

Based on the foregoing, MCI urges the Commission to adopt the positions contained herein and in MCI's initial comments.

Respectfully submitted,

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July 15, 1996

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[27] NPRM at para. 50.

[28] Comments of RBOCs at 18.

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, hereby certify that a true copy of the foregoing "REPLY" was served this 15th day of July, 1996, by hand delivery or first class mail, postage prepaid, upon each of the following persons:

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